Rhina Bhar v Malaysian Bar

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 17-41-1993
ANUAR J
4 OCTOBER 1993

Legal Profession *— Duties of advocate and solicitor — Applicant's counsel a member of the defendant — Whether counsel could continue to act for applicant — Whether conflict of duty and embarrassment arose — Legal Profession (Practice and Etiquette) Rules 1978 r 16*

The plaintiff, who is a practising advocate and solicitor, was suspended for three months by a disciplinary committee convened under the Legal Profession Act 1976 ('the Act'). An appeal against the decision was heard in the Penang High Court in which RR Sethu appeared for her. The plaintiff was unsuccessful and a stay was granted pending her appeal to the Supreme Court. In those proceedings, the Bar Council, the defendant in this originating summons, was not cited as a party and did not intervene although its representatives attended the hearing. Three days prior to the Supreme Court hearing, the Bar Council objected to RR Sethu appearing for the plaintiff in the Supreme Court, apparently on grounds of conflict of interest and embarrassment. The plaintiff has applied for a declaration that the decision of the Bar Council that RR Sethu, her intended counsel in her Supreme Court appeal, ought not to appear, was unconstitutional, illegal, inoperative, null and void and of no effect.

Held, allowing the plaintiff's application:

(1) Neither the Bar Council nor any body other than a competent court of law has the right to fetter the discretion of a counsel. The duty of an advocate and solicitor is summarized in r 16 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules').

(2) As a general rule, a solicitor who is a member of a public authority should not be professionally engaged in any proceedings to which the authority is a party or in which it is directly interested. If exceptional circumstances justify any departure from this general rule, it is the duty of the solicitor to ensure that the interests of the authority are already protected. Even assuming that the Bar Council can be equated as a public authority, they are not directly involved in the absence of any attempt to intervene in the proceedings.

(3) The constitutional right of any citizen under art 5 to have the services of a counsel of his or her choice is subject to practical limitations. In this case, Sethu is willing, ready and able to act as counsel and is well aware of the facts of the case having acted as counsel in the High Court and having been in charge of the proceedings until the impending 'crisis' arose. The plaintiff has

found it almost impossible to find alternative counsel of standing to argue the appeal and if the declaration is not granted, it would cause great hardship and inconvenience to the plaintiff as it involved her sole career. On the other hand, there would be no serious inconvenience and embarrassment to the Bar Council if a declaration was granted.

(4) The court therefore granted the declaration sought and a further declaration to the effect that RR Sethu is and shall be at full liberty to appear for the plaintiff in the appeal without any restriction by the Bar Council as to the mode and manner of his performance of his duties within the meaning of the Rules and without the risk of any penalty under the law.

[Bahasa Malaysia summary

Plaintif yang merupakan seorang peguambela dan peguamcara yang menjalankan amalan, telah digantung selama tiga bulan oleh suatu jawatankuasa tatatertib yang dipanggil di bawah Akta Profesion Undang-Undang 1976 ('Akta itu'). Suatu rayuan terhadap keputusan itu telah didengar di Mahkamah Tinggi Pulau Pinang di mana RR Sethu telah mewakilinya. Plaintif tidak berjaya dan suatu penggantungan perlaksanaan telah dibenarkan sementara menanti keputusan rayuannya ke Mahkamah Agung. Dalam prosiding itu, Majlis Peguam, defendan dalam saman pemula ini, tidak dinamakan sebagai suatu pihak dan tidak mencelah walaupun wakilnya telah menghadiri pendengaran itu. Tiga hari sebelum pendengaran di Mahkamah Agung, Majlis Peguam telah membuat bantahan terhadap perwakilan plaintif di Mahkamah Agung oleh RR Sethu, kononnya atas alasan percanggahan kepentingan dan kesulitan. Plaintif telah memohon untuk suatu deklarasi bahawa keputusan Majlis Peguam bahawa RR Sethu, peguambela yang diharapkan untuk rayuannya ke Mahkamah Agung itu, tidak harus hadir, adalah tidak berperlembagaan, menyalahi undang-undang, tidak berkuat kuasa, batal dan tidak sah dan tidak berkesan.

Diputuskan, membenarkan permohonan plaintif:

(1) Majlis Peguam mahupun sebarang badan yang lain, selain daripada mahkamah undang-undang yang kompeten, tidak mempunyai hak untuk membelenggu budi bicara seseorang peguambela. Tugas seseorang peguambela dan peguamcara diringkaskan dalam k 16 Legal Profession (Practice and Etiquette) Rules 1987 ('Kaedah itu').

(2) Sebagai peraturan am, seseorang peguamcara yang menjadi ahli sesuatu pihak berkuasa awam tidak harus diguna khidmat di dalam sebarang prosiding di mana pihak berkuasa itu merupakan suatu pihak ataupun di mana ia mempunyai kepentingan secara langsung. Jika terdapat keadaan luar biasa yang menjustifikasikan suatu penyimpangan daripada peraturan am ini, adalah menjadi tugas peguamcara itu untuk memastikan bahawa kepentingan

pihak berkuasa itu telahpun dilindungi. Jikalaupun Majlis Peguam boleh disamakan dengan suatu pihak berkuasa awam, ia tidak terlibat secara langsung tanpa sebarang percubaan untuk mencelah dalam prosiding itu.

(3) Hak perlembagaan seseorang rakyat di bawah perkara 5 untuk mendapatkan perkhidmatan peguamcara pilihannya tertakluk kepada sekatan praktikal. Dalam kes ini, Sethu sanggup, bersedia dan boleh bertindak sebagai peguambela dan mempunyai pengetahuan tentang fakta kes ini kerana telah bertindak sebagai peguambela di Mahkamah Tinggi dan telah mengendalikan prosiding sehingga 'krisis' ini timbul. Plaintif tidak mungkin dapat mencari peguambela alternatif yang dipandang tinggi untuk menghujah rayuan itu dan jika deklarasi ini tidak diberi, ia akan mengakibatkan kesusahan dan kesulitan teruk kepada plaintif kerana ia melibatkan pekerjaannya yang tunggal. Sebaliknya, tidak ada kesusahan dan kesulitan serius yang akan diakibatkan kepada Majlis Peguam jika deklarasi ini diberikan.

(4) Mahkamah oleh itu memberikan deklarasi yang dipohon dan suatu deklarasi selanjutnya, iaitu bahawa RR Sethu mempunyai kebebasan penuh untuk mewakili plaintif dalam rayuannya tanpa sebarang sekatan oleh Majlis Peguam mengenai cara beliau menjalankan tugasnya mengikut maksud Kaedah itu dan tanpa sebarang risiko denda di bawah undang-undang.]

Cases referred to

1 *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 (refd)

2 *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph* [1993] 2 MLJ 57 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 3(a), 16, 20

Rajasingam (*CKG Pillai* with him) (*Rajasingam & Co*) for the plaintiff.
Tuan Haji Sulaiman bin Abdullah (*Zain & Co*) for the defendant.

Anuar J: The plaintiff in this originating summons, heard as a matter of urgency on 16 and 29 September 1993 by this court, is a practising advocate and solicitor, Rhina Bhar. She applies to this court for a declaration that the decision of the Bar Council, the defendant, that RR Sethu, her intended counsel in her Supreme Court Civil Appeal No 02–107–92, scheduled for hearing on 11 October 1993, ought not to appear, is unconstitutional, illegal, inoperative, null and void and of no effect.

The brief history of the case, insofar as relevant to this application, is as follows.

On 29 June 1991, the plaintiff was suspended for three months by a disciplinary committee convened under the Legal Profession Act 1976 ('the Act'). An appeal against the decision by the plaintiff was heard by three judges in the Penang High Court in which RR Sethu appeared for her

A together with another counsel, Ghazi Isak. This appeal was finally disposed of on 21 February 1992 and the plaintiff was unsuccessful (application for stay was granted). She then appealed to the Supreme Court which was fixed for hearing on 19 July 1993.

At this juncture, it is interesting to note that in these proceedings, the B Bar Council, the present defendant in this originating summons, was not cited as a party. The Bar Council also did not choose to intervene in the proceedings although the representatives attended the hearing.

In another development three days prior to the Supreme Court hearing, the Bar Council is alleged to have decided to object to RR Sethu appearing for the plaintiff in the Supreme Court, apparently on grounds of conflict of C interest and embarrassment. This decision took the plaintiff by surprise. In any event, when the Supreme Court presided on 19 July 1993, Tuan Haji Sulaiman bin Abdullah, together with another representative Paul Manecksha, both advocates and solicitors, appeared for the Bar Council and raised objections against RR Sethu representing the plaintiff. It is not D evident in what capacity they suddenly appeared as they were not parties to the proceedings. But the point is irrelevant as our courts are open to anyone. In fact, sometimes the court invites counsel to appear as amicus curiae. Following the objection by Haji Sulaiman, the case was adjourned to 11 October 1993 probably to resolve the propriety or otherwise of RR Sethu appearing at the hearing. There are diverse versions of what transpired at E the Supreme Court and I am unable to decide the exact nature of the situation which took place there. No transcript of notes by the learned judges of the Supreme Court has been produced to assist me. However, I would assume that the Supreme Court did not resolve the dispute one way or the other although they could have offered observations with a view to F settle the dispute amicably between the parties. The above chain of events led to the present originating summons.

Before discussing the cardinal points, at the outset, I must express my disappointment at the acrimonious and confrontational attitudes displayed by the parties in their correspondence, copies of which were produced before me. For fear of enlarging the conflict between a parent body and its G members, I refrain from any further comments as the issues before me could be decided irrespective of the irrelevant details of the correspondence between them and the innuendos in the affidavits.

The first point occurring to my mind is whether this court has the jurisdiction to make the declaration sought. Numerous authorities have H been quoted before me, apart from the court doing its own research, but I need not rely on them to arrive at my decision except to the bare minimum. The scope of declaratory remedy was thoroughly explored by the then Federal Court in the case of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor.*[1] The upshot of the decision in the words of Lee Hun Hoe CJ (Borneo) is [at p 107]: I

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited only to its own discretion ... In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment

that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy.

In the same case of *Datuk Syed Kechik*,[1] the Federal Court quotes with apparent approval a passage from an American author, EM Borchard on *Declaratory Judgements*, referring to those cases where no traditional wrong has yet been committed or immediately threatened:

... a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom and his pecuniary interests. This is a tangible interest which the law protects against impairment and by promoting it, promotes social peace.

I feel the above view is a guide to me in deciding this case. Another illuminating legal literature relevant to the issue is summarized in the UK *Supreme Court Practice*. The notes under O 15 r 16 under the heading 'future rights' reads:

Future rights — The Court has jurisdiction as to rights depending upon a future event: but the practice is not in ordinary cases to make such a declaration unless (a) a present right depends on the decision; or (b) all parties interested in any event are sui juris; or (c) there are special circumstances ...

A declaration will not be made where it would serve no useful purpose, eg that the plaintiff is entitled to do something which is notoriously against the rules of his profession and which he does not intend to do.

Bearing in mind cautiously the above guidelines, let me analyse the objection of the defendant for Sethu to appear for the appeal.

At one stage the Bar Council did not have any objection for RR Sethu to appear for the plaintiff. Even now, the Bar Council seems to raise no objections if Sethu as counsel does not rely on *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph*[2] that would allegedly require the plaintiff to allege that the defendant and Bar Council had breached the Act. The Bar Council adds that Sethu, as a current Bar Council member, is placed in a position of conflict of interest and embarrassment.

Before I consider other aspects of the case, let me pause here to discuss the effect of forbidding Sethu to rely on *Au Kong Weng Joseph*'s case.[2] I understand that the defendant in its hurried affidavit is referring to the Supreme Court case of *Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph*,[2] affirming the decision of the High Court that compliance with the time frame for institution of disciplinary proceedings against lawyers under the Act is mandatory. To my mind, neither the Bar Council nor any body other than a competent court of law has the right to fetter the discretion of a counsel. The duty of an advocate and solicitor is summarized in r 16 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules') which says:

An advocate and solicitor shall while acting with due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interests of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

A It is a fallacy to assume that counsel's submissions are the criteria for court adjudication although the court depends upon the counsel to assist the court without misleading it. In fact, the obligation of the counsel to rely on precedents is clear-cut in r 20 of the Rules which states:

> An advocate and solicitor shall put before the Court any relevant binding
B decision of which he is aware which is immediately in point, whether it be for or against his contention.

It is highly presumptuous on the part of anyone to ignore the fact that it is the court which controls the proceedings and decides questions like what is relevant and admissible and what the overall effect is. It is not the function
C of counsel, however eminent he is. Another question which occurs to my mind is 'does revealing the true state of law as reported in the law journal and relying on it' cause any embarrassment? Truth should never hurt anyone. Before the appeal is heard, it will be premature for any third party, other than the tribunal hearing the case, to presuppose the course that the hearing will take. Mr Sethu has indicated that as far as he is concerned,
D there is no embarrassment. Embarrassment is a subjective phenomenon. It is ironic that such possibility is attributed to senior counsel as Sethu, whom the Bar Council admits elsewhere in the correspondence, is a man for whom the Bar Council 'has the highest respect for competence and professional integrity'. If it is so, why not grant him the independence to
E act, if he chooses? By contending that there is a conflict of interest and embarrassment, does the action of the Bar Council not display a veiled threat?

Regarding embarrassment and conflict of duty, let us peruse what the Rules say. Rule 3(a) reads:

F (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises—

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to same matter;

G (ii) where there is some personal relationship between him and a party or a witness in the proceedings.

At the material time, when the complaint arose, Sethu was in the United Kingdom and it is obvious that he had no involvement in the disciplinary action against the plaintiff. In any case, there is neither any allegation nor
H any evidence to indicate that Sethu, whose interests are interlinked with that of the plaintiff, has any dual interests creating any conflict even by common law standard. If at all the occasion so arises that Sethu has to allege and substantiate any inadequacy on the part of the defendant, the Bar Council, it has to be accepted in good democratic spirit. The duty of the defendant is to rebut the contentions, if justified, and not prevent the issue
I being raised. This court cannot equate the position of the Bar Council to that of a cabinet which has, to speak, by convention with one voice. In the legal world, when often abstract rights are in dispute, it is not uncommon for a decision of a lower body to be criticized before a higher tribunal by an

aggrieved party, often without cause and the law cannot take cognizance of undue sensitivity. Apart from the narrow definition of conflict of duties in the Act, I have personally done some research on the question. *Codrey On Solicitors* states generally, in the opinion of the Council of Law Society, as a general rule, a solicitor who is a member of a public authority should not be professionally engaged in any proceedings to which the authority is a party or in any matter in which it is *directly* interested (emphasis added). If exceptional circumstances justify any departure from this general rule, it is the duty of the solicitor to ensure that the interests of the authority are already protected. Even assuming that the Bar Council can be equated as a public authority, they are not directly involved in the absence of any attempt to intervene in the proceedings. In any case, what is the interest to be protected? Is it a cover up for omissions probably made in ignorance of anticipated changes in interpretation of law? If so, is it not better to ratify the position rather than avoid the issue? Anyway, the effect of the precedent in dispute is a matter for argument before the Supreme Court and my casual comments must not be misconstrued. In my opinion, the whole crux of the doctrine of conflict of interest is to prevent probability of abuse of confidence, which is not applicable in the present case.

Reverting to the point of using my discretion, one point strongly urged on behalf of the plaintiff is the constitutional right of any citizen under art 5 to have the services of a counsel of his or her choice. I am aware that this right is subject to practical limitations. In this case, Sethu is willing, ready and able to act as counsel. He is well aware of the facts of the case having acted as counsel in the High Court and having been in charge of the proceedings until the impending 'crisis', if I may say so, arose. One relevant fact I bear in mind in exercising my discretion is the fact that the subject matter of the complaint must have arisen more than six years ago, 17 August 1987 being the date the Bar Council referred the complaint to the local Bar Committee. The plaintiff has stated on oath that she finds it almost impossible to find alternative counsel of standing to argue the appeal. This contention has not been rebutted. She is entitled for her faith and belief and the appeal to be determined without having to search grudgingly another counsel.

Before I decide one way or another, I have to apply my mind whether the declaration has any utility. If so, it should be balanced against the inconvenience and embarrassment of the Bar Council. If the declaration is not granted it will cause great hardship and inconvenience to the plaintiff as the appeal involves apparently her sole career. On the other hand, there will be no serious inconvenience for the Bar Council if a declaration is granted as prayed. I cannot visualize any embarrassment for the Bar Council among right-thinking members of the Bar Council or public as exploration of law by the highest tribunal of the land is one of the contingencies we have to contend with. Law can never remain static. Even if I refuse a declaration and Sethu cannot appear, it is inconceivable how it will help the Bar Council except for the apparent image of unity of the council members, while causing hardship to the plaintiff and depriving her of her fundamental constitutional right. Although the image of the Bar Council is not an issue with any evidence to comment on, it is not irrelevant to point out that

A according to repeated newspaper reports, such unity is very often lacking and I wonder whether an isolated incident of criticism of the Bar Council will have any real tangible consequence. The net result may be ultimately another counsel will be found with hardship to the plaintiff and he will probably put forward the same criticism against the Bar Council perhaps less charitably than Mr Sethu who is admitted by the Bar Council to be a B distinguished lawyer of high integrity.

In the circumstances, I hereby grant the first declaration. At the same time, with regards to the prayer in (c), I amend the wordings of the prayer and grant a declaration to the effect that RR Sethu is and shall be at full liberty to appear for the plaintiff in the said civil appeal without any C restriction by the Bar Council, the defendant, as to the mode and manner of his performance of his duties within the meaning of the Legal Profession (Practice and Etiquette) Rules 1978 and without the risk of any penalty under the law. I substitute this wording to avoid any ambiguity and to reflect the considered judgment of the court to do justice to the plaintiff and her counsel, RR Sethu, as well as to the defendant.

D I must emphasize that in my decision, I am only concerned with the legal propriety of any order/direction given by the defendant in restraining or restricting the audience of Sethu on behalf of the plaintiff in the relevant Supreme Court appeal. No other issue was substantially canvassed before this court by any party. As each case is decided on its own facts, this E decision should not therefore be construed as fettering the statutory discretionary powers of the defendant who is doing a difficult job in very trying circumstances. Although I find against them on the particular facts, I do not attribute any wilful mala fide on their part and accordingly I order each party to bear its own costs.

Before I conclude I must thank the counsel for both parties for arguing F painstakingly this novel point of interpretation.

Application allowed.

Reported by Anne Khoo

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